Supreme Court, U.S.
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No. 97-1349

In The

Supreme Court of the United States

October Term, 1997

ANA MARIA PAINTER,

Petitioner,

v.

GOLDEN RULE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a dispute between a health insurer and the insured, which arose under an individual conversion policy issued pursuant to an employee benefit plan, preempted by ERISA?

2. Does ERISA preempt state law claims of malicious prosecution and breach of fiduciary duty arising out of an insurer's instituting a declaratory judgment action to resolve a coverage issue that arose from an insurance policy issued pursuant to an employee benefit plan, and are such actions removable to federal court?

PARTIES TO THE PROCEEDING BELOW AND DISCLOSURE UNDER SUP. CT. R. 29.6

Petitioner Ana Maria Painter was plaintiff in the proceedings below. Respondent Golden Rule Insurance Company was defendant in the proceedings below. There are no parent or wholly-owned subsidiary or affiliate corporations of respondent.

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RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT

The last paragraph of petitioner's four-paragraph Jurisdictional Statement correctly states the basis for this Court's jurisdiction. However, the first paragraph of petitioner's statement is not completely accurate. In accordance with Sup. Ct. R. 15.2, therefore, respondent notes the following.

Petitioner's state court Petition was not for "abuse of legal process" only. There were two counts: malicious prosecution and breach of fiduciary duty. *See* Appendix to Petition for Writ of Certiorari, at A-12. The case was removed not only based on federal question jurisdiction, but also based on diversity jurisdiction. *See id.* The district court did not enter summary judgment; instead, the case was dismissed based on the court's finding that ERISA preempted the purported state law claims. *See id.* at A-14-15. Petitioner never attempted to state any ERISA cause of action. *See id.* at A-9.

STATEMENT OF THE CASE

Petitioner Painter's Statement of the Case is not limited to the pertinent facts relating to the present Petition for Certiorari. Instead, Painter's Statement references mostly irrelevant facts, many of which are unsubstantiated, and some of which are not even accurate.

The Eighth Circuit's opinion below contains an accurate statement of the facts of the two lawsuits that were consolidated on appeal below. *See* Appendix to Petition, at A-2-3. Painter had been a participant in an ERISA-

governed employee benefit plan pursuant to which she became insured under a group policy issued by respondent Golden Rule. A benefit of the plan and the group policy was the right to obtain a conversion policy upon termination of coverage under the group policy. When Painter's coverage under the group policy ended, she opted to continue her health insurance under the conversion policy.

The dispute that gave rise to these two lawsuits was an insurance coverage issue. When Painter sought coverage under the conversion policy for high dose chemotherapy for her ovarian cancer, Golden Rule notified her that the treatment was not covered under the policy. Because the parties disagreed as to whether the treatment was covered, and because of the potential claims that were being asserted by Painter at the time, Golden Rule filed the declaratory judgment action ("*Painter I*"), seeking a determination by the court on the coverage issue. In response, Painter chose not to address the coverage issue. Instead, Painter moved to dismiss arguing that Golden Rule filed the lawsuit prematurely because it should have first pursued a claims review procedure outlined in the policy. Golden Rule agreed to pursue the procedure and moved to dismiss voluntarily without prejudice. The district court granted that motion. The coverage issue, therefore, never was addressed in *Painter I*.

After the district court entered the order of dismissal in *Painter I*, Painter filed the second lawsuit in state court ("*Painter II*"), alleging malicious prosecution and breach of fiduciary duty. Golden Rule removed the case to federal court based on ERISA preemption and diversity jurisdiction. Golden Rule then filed its Motion asking the

Court either to dismiss or to order Painter to file a more definite statement of her ERISA claim, if any. Painter opted not to amend to attempt to state an ERISA cause of action, but instead only disputed the issue of ERISA preemption. The district court held that ERISA governed the lawsuit and dismissed, there having been no request on Painter's behalf to amend her complaint. *See* Appendix to Petition, at A-9. Again, by plaintiff's choice, the coverage issue was never reached in *Painter II*. *See* Appendix to Petition, at A-9, n.4.

With her present Petition, Painter argues only that the courts below erred by holding that the conversion policy was governed by ERISA. Therefore, the pertinent facts here are straightforward and undisputed: Painter obtained the conversion policy as a result of her participation in the ERISA-governed employee benefit plan, the coverage dispute that arose between Painter and Golden Rule resulted in the declaratory judgment action (*Painter I*), and Painter subsequently claimed (in *Painter II*) that Golden Rule's filing of *Painter I* amounted to malicious prosecution and breach of fiduciary duties.

Most of Painter's factual allegations are, therefore, irrelevant. Moreover, because neither lawsuit below, *Painter I* nor *Painter II*, actually proceeded beyond the pleadings and initial motion stages, many of the "facts" related by Painter now are also unsubstantiated.

Finally, in accordance with Sup. Ct. R. 15.2, Golden Rule must note the inaccurate statements made by Painter in her Statement of the Case. First, Painter has failed to mention the fact that the second count of her state court petition in *Painter II* claimed a breach of

fiduciary duties. Instead, she characterizes the lawsuit as involving only a claim of malicious prosecution and only a challenge of Golden Rule's conduct as insurer.

Second, Painter asserts now that she "sued no ERISA primary party." However, she claimed in *Painter II* that Golden Rule had breached fiduciary duties – something Golden Rule obviously could not have done unless it were a fiduciary. In other words, at the time she filed her lawsuit, Painter claimed that Golden Rule was a fiduciary, one of the ERISA primary parties.

Third, Painter alleges that Golden Rule claimed to be a plan participant in its complaint in *Painter I*. The original complaint did rather inartfully state that Golden Rule was a "participant in" employee benefit plans, but it never stated it was a "plan participant," as that term is used in ERISA. While Golden Rule's statement in its original complaint might have been misconstrued, Golden Rule's first amended complaint contained no such statement. Accordingly, Painter's repeated contention that Golden Rule erroneously claimed to be a "plan participant" has no factual basis.

Finally, Painter asserts that the district denied her motion to remand and offered her no opportunity to amend in *Painter II*. There was no motion to remand. Golden Rule based its removal not only on federal question jurisdiction but also on diversity jurisdiction. Therefore, even if there were no jurisdiction under ERISA, there still would not have been any basis for a motion to remand. Moreover, because Golden Rule responded to the complaint in *Painter II* with a motion, rather than an answer, Painter could have amended her complaint at

any time during the five-month period of time during which Golden Rule's motion was under submission to the district court. *See* Fed. R. Civ. P. 15(a) (a party can amend "as a matter of course at any time before a responsive pleading is served"). Because she chose not to do so, she cannot blame the district court now.

ARGUMENT

The Questions Presented section of Painter's Petition purports to present two questions, but the Petition's Argument addresses only one of the two questions. The first question addresses the Eighth Circuit's determination that ERISA governs the conversion policy. The second question, "presented" but not argued, appears to be concerned with the Eighth Circuit's holding that Painter's purported state law claims were preempted by ERISA.

1. Painter has provided no reason for this Court to address the conversion policy issue.

Painter's principal argument appears to be that there have been varying decisions regarding the conversion policy issue, and this Court should accept this case to clear up the purported confusion. *See* Petition, at 9-13. There is, however, no confusion among the circuits.

In fact, the decisions from the various courts of appeal that have addressed the issue have been consistent. The few decisions to the contrary have all been district court decisions. Therefore, the inconsistent adjudications do not present a basis for this Court to grant

plaintiff's Petition. *See* Sup. Ct. R. 10(a) (conflicting decisions among the United States courts of appeal may be basis for certiorari).

Painter cites, as did the Eighth Circuit in its opinion, several court of appeal decisions where conversion policies were held to be governed by ERISA. *Reynolds v. Massachusetts Casualty Ins. Co.*, 113 F.3d 1450, 1453 (6th Cir. 1997); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404, 407-08 (9th Cir.), *cert. denied*, 116 S. Ct. 377 (1995); *Glass v. United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1346-47 (11th Cir. 1994); *Qualls v. Blue Cross of California*, 22 F.3d 839, 843 (9th Cir. 1994); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 816-17 (9th Cir. 1992); *Tingey v. Pixley-Richards West, Inc.*, 953 F.2d 1124 (9th Cir. 1992); *Howard v. Gleason Corp.*, 901 F.2d 1154, 1157-58 (2d Cir. 1990). There is, and has been, no conflict among the circuits on this issue.

Painter is able to cite only a few district court decisions where conversion policies were not held to be governed by ERISA. Painter, however, does not and cannot cite any decision of a court of appeal in support of her position.

Painter's next argument appears to be that it is simply unfair for ERISA to govern a conversion policy because, according to Painter, the remedies under ERISA are inadequate. *See* Petition, at 13. Congress chose the remedies to be available under ERISA, and Congress chose to include the preemption provision in ERISA, and Painter's disappointment with these provisions of the statute is no basis for certiorari. This Court has clearly stated that the remedies outlined by Congress in the

statute are the exclusive remedies under ERISA. *See, e.g., Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2066 (1993), citing *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980) (ERISA is a "comprehensive and reticulated statute"), and *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (§ 502(a) contains "six carefully integrated civil enforcement provisions"); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme" evidencing Congress' intent that those remedies are the exclusive remedies available under ERISA).

Painter's remaining arguments are taken from the memorandum that the Department of Labor attempted to submit in support of Painter's petition for rehearing, but which was filed out of time and rejected by the Eighth Circuit. *See* Petition, at 14-17. None of these arguments is convincing.

Painter argues that allowing a conversion policy to be governed by ERISA is tantamount to creating a new employee benefit plan. That is not the case. As the Eighth Circuit recognized, the conversion policy here was part of the plan established by the employer. *See* Petition, at A-6. Painter's argument mischaracterizes the nature of an insured employee benefit plan. As is true with any insured plan, the group policy and the conversion policy were not, themselves, employee benefit plans; they were, instead, only vehicles for funding the benefits of the plan established by the employer.

Painter also argues that a conversion policy is too separate from a plan to be governed by ERISA because there is no party to assume ERISA's plan administration

and fiduciary obligations. That is incorrect. As noted above, the conversion policy does not create a new plan. The existing plan continues to have a plan sponsor and administrator, and any reporting and disclosure requirements, as well as fiduciary obligations, continue. Painter's argument that some employers do not carry out those obligations perfectly does not, of course, change the fact that the ERISA requirements exist and are enforceable.

Moreover, even if the plan sponsor were to become distanced from the conversion policy, the insurer nevertheless would remain responsible for policy claims, and ERISA provides appropriate causes of action for the insured to assert against the insurer. The insured can assert claims under ERISA § 502(a)(1)(B). The insurer may even have fiduciary obligations. *See, e.g., Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 217 (8th Cir. 1993) (any party, including an insurer, may be a fiduciary to the extent it exercises discretionary authority with respect to the plan).

Several courts of appeals have concluded that conversion policies issued pursuant to employee benefit plans are governed by ERISA. Plaintiff's arguments that those decisions were wrong are not convincing. There is no reason to overturn the Eighth Circuit's decision below.

2. The Eighth Circuit correctly held that Painter's state law claims were preempted by ERISA.

The Eighth Circuit applied the principle of conflict preemption in holding that ERISA preempted Painter's state law claims. *See Boggs v. Boggs*, 117 S. Ct. 1754, 1761

(1997) (a state law that conflicts with an ERISA provision is preempted whether or not the statutory phrase "relate to" supports preemption). Painter's purported claims of malicious prosecution and breach of fiduciary duty were directed to Golden Rule's conduct in responding to Painter's claim under the conversion policy. ERISA provides the exclusive remedies for any mishandling of a claim under an employee benefit plan. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (state tort claim directed to alleged mishandling of insurance benefit claim preempted).

In her present Petition, Painter offers no argument against the Eighth Circuit's analysis. There is no reason to overturn that decision.

CONCLUSION

For the foregoing reasons, respondent Golden Rule Insurance Company respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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